

Abstract:

In *Miller; McFarlane* it was suggested that in financial remedy applications the guiding principle of fairness has three strands: needs, compensation and sharing. Each of these strands was said to be related to the parties' relationship, either causally or temporally. The ideas of causal and temporal connection have been neglected in subsequent case law. It is suggested that exploring them may provide a new way of thinking about financial remedy cases. Understanding the various rationales for allowing claims based on causal and temporal connections reveals something about the nature of marriage and the different ways that it is conceptualised in English law. The idea of causal and temporal connections is also valuable in providing a framework for thinking about those cases in which there are delays in bringing a financial remedy claim.

Keywords: marriage, financial remedy, care, needs, compensation, sharing

In England and Wales, financial remedy case law has long been concerned with providing an objective for the division of assets between a couple on divorce. Judges have a wide discretion in reaching a result, guided by a statutory list of factors in Matrimonial Causes Act 1973, s 25. However, the judge operating under s 25 has been likened to a bus driver who is given a set of instructions about how to drive a bus but not told his destination.¹ *White v White*² marked perhaps the clearest change of direction in recent years. Rather than simply providing the homemaker with sufficient to meet his or her needs and leaving the breadwinner with any surplus remaining after needs have been met, judges were directed to achieve a fair result and to divide the assets in a way that did not discriminate on the basis of who earned the money. This change of direction, particularly important for the outcomes in high value cases, was further refined by *Miller v Miller; McFarlane v McFarlane*,³ which made clear that fairness had three strands: needs, compensation and sharing.

Thus judges applying s 25 must now aim to achieve a result that meets needs, compensates for relationship generated disadvantage and ensures a fair sharing of the fruits of the marital partnership. These three principles start from very different underlying premises. Need is 'a very

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¹ P Parkinson, 'The Diminishing Significance of Initial Contributions to Property' (1999) 13 *Australian Journal of Family Law* 52, 53, explaining Justice Chisholm's extra-judicial writing on the equivalent Australian statute cited in Law Commission, Matrimonial Property, Needs and Agreements (Law Com No 343, 2014).

² *White v White* [2000] UKHL 54.

³ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

broad concept with no single definition in family law'.⁴ In so-called big money cases, the sums required to meet need can be significant. However, in most cases, the key needs are for housing and income.⁵ The requirement to meet need has been justified on the basis of the interdependence that is typical in marriage.⁶ Sharing is an entitlement-based principle which views both parties as being entitled to share the matrimonial property by virtue of the partnership. Finally, compensation is concerned with the extent to which one party has suffered detriment as a result of the relationship. The ideas of needs, compensation and sharing have themselves been explored further by subsequent case law. The idea of compensation is far from universally popular⁷ and the precise meaning of 'needs' is often a matter of contention. However, case law following *Miller; McFarlane*⁸ has done little to clarify the theoretical underpinning of these concepts.

In *Miller; McFarlane* itself, Baroness Hale explained the rationale for the redistribution of assets between spouses as follows:

'In my view there are at least three. Any or all of them might supply such a reason, although one must be careful to avoid double counting. The cardinal feature is that each is looking at factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended.'⁹

Exploring the ideas of causal and temporal connections may provide a new way of thinking about financial remedy case law. Understanding the various rationales for allowing claims based on causal and temporal connections in the case law reveals something about the nature of marriage and the different ways that it is conceptualised in English law. The idea of causal and temporal connections is also valuable in providing a framework for thinking about those cases in which there are delays in bringing a financial remedy claim. Such cases raise concerns about the balance to be struck between ensuring that each spouse receives their fair share of the matrimonial property and is compensated appropriately for relationship generated disadvantage and the concern that a spouse may remain the insurer for their former partner long after their relationship ends (something that is also a concern in variation of maintenance case law). The case of *Wyatt v Vince*¹⁰ and the forthcoming appeal in *Mills*

⁴ Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc343_matrimonial_property.pdf> accessed 11 December 2017, at page x.

⁵ Family Justice Council, 'Guidance on "Financial Needs" on Divorce' (June 2016), 17.

⁶ See *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 and Family Justice Council, 'Guidance on "Financial Needs" on Divorce' (June 2016), 15.

⁷ See, for example, *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 Fam, *SA v PA* [2014] EWHC 392 (Fam).

⁸ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

⁹ *Ibid.*, [137].

¹⁰ *Wyatt v Vince* [2015] UKSC 14.

*v Mills*¹¹ have recently brought this issue into sharp relief. When combined with legal aid cuts, which potentially reduce the ability of spouses to bring financial remedy claims at the point of divorce, this issue may assume greater prominence in years to come.

What are causal and temporal connections?

Broadly speaking, causal connections are concerned with whether a relationship is in some way responsible for creating a financial claim, whereas temporal connections are simply concerned with the time at which the source of the unmet need for which provision is sought arose and, specifically, whether it arose during the relationship. Whereas causal connections are relatively uncontroversial as a basis for financial remedy, temporal connections are less universally accepted. This is reflected in two different schools of thought about the basis for temporal claims in the case law, which each suggest a different concept of marriage and the obligations it generates.

The first, pragmatist view, considers that responsibility for temporal claims cannot be theoretically justified but is instead a utilitarian device to pin what should otherwise be state responsibility on an individual, and that the notion of interpersonal obligation has been 'distorted'¹²:

'For my part I find it difficult to see why it is just and reasonable that an ex-husband should have to pay spousal maintenance or enhanced spousal maintenance by reference to factors which are not causally connected to the marriage, unless one is looking at the issue in a macro-economic utilitarian way and deciding that in such circumstances it is better that the ex-husband picks up the cost of the ex-wife's support rather than the hard-pressed taxpayer. This, again, is a matter of social policy. But I would suggest that in such a case spousal maintenance payments should only be awarded to alleviate significant hardship.'¹³

This view of marriage suggests that marriage is akin to a contractual relationship between two autonomous individuals. On this view, it might be argued that each spouse should be responsible for his or her own support after divorce, to the extent that any needs are not causally connected to the marriage. Indeed, in a very different social context with far greater state support, it is this view of spouses as 'capable and independent individuals'¹⁴ that underpins the provisions in the Swedish Marriage Code that require each spouse to be responsible for his or her own support following

¹¹ *Mills v Mills* [2017] EWCA Civ 129, due to be heard on appeal to the Supreme Court in 2018.

¹² L Ferguson, 'Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation' (2008) 22 *International Journal of Law, Policy and the Family* 61.

¹³ *SS v NS* [2014] EWHC 4183 (Fam) [31].

¹⁴ C Sörgjerd, *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society* (Intersentia, 2012), 110.

divorce.¹⁵ Whilst Sweden has a far more generous welfare state than England and Wales, the pragmatist view does not necessarily require this. It is equally consistent with a 'liberal' welfare state where '[e]ntitlement rules are... strict and often associated with stigma; benefits are typically modest'¹⁶ or a social democratic regime, like Sweden, in which ideas of 'universalism'¹⁷ underline state benefits and the aim is 'to promote and equality of the highest standards.'¹⁸ The concern of the pragmatist view is simply about where the ultimate theoretical responsibility lies for meeting needs. Joanna Miles¹⁹ suggests that there are three levels of responsibility: local responsibility for yourself, the horizontal responsibility of individuals in (or who were in) a domestic relationship, and the vertical responsibility of the state. The pragmatist view suggests that following a relationship, responsibility is primarily individual. However, if the individual cannot support him or herself alone then the responsibility is vertical (state) and not horizontal (spouse). If the pragmatist view is taken in a jurisdiction such as England and Wales, with a 'liberal' welfare state, there is the potential for the financially weaker party to end up in a precarious financial position.

By contrast, the second view of temporal connections, the principled view, considers that claims based on temporal connections alone are justified. This view rests on the idea that the function marriage performs, and the interdependency inherent within it, provides the basis for both causally and temporally based claims against a former spouse. This view can be seen in Lord Nicholls' speech in *Miller; McFarlane*:

'... to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.'²⁰

On this view, marriage is not seen as a contractual-style relationship between two autonomous individuals, but rather a relationship of dependence or interdependence. The parties rely upon one

¹⁵ The Marriage Code of 1987, Chapter 6, Section 7.

¹⁶ G Esping-Anderson, *Three Worlds of Welfare Capitalism* (Polity Press, 1990), 49.

¹⁷ Ibid, 50.

¹⁸ Ibid.

¹⁹ J Miles, 'Responsibility in Family Finance and Property Law' in J Bridgeman, H Keating and C Lind (eds) *Regulating Family Responsibilities* (Ashgate, 2011).

²⁰ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [11].

another and make decisions for the good of the unit that are not necessarily in their own individual best interests. As Anne Barlow explains:

‘Marriage is typically an economic as well as an emotional relationship involving financial dependency or inter-dependency, especially where there are children. One spouse will often make financial sacrifices by giving up their job or taking part-time work in order to care for children or elderly relatives; or perhaps to fit in with the demands of the other spouse’s career for the benefit of the family as the whole.’²¹

Whereas the financial sacrifices involved in caring for children are examples of a causal connection, as discussed further below caring for elderly relatives is best seen as being temporally connected to the marriage. The theme that unites them both is interdependence. Such interdependence can have very real impacts on the future ability of spouses to support themselves. The available data demonstrate this particularly clearly in the context of childcare responsibilities, where women, and mothers in particular, tend to be financially worse off following separation.²² Often this is because of the way in which parents divide childcare responsibilities between them. Women still undertake the majority of unpaid work. In 2012, a British Social Attitude Survey found that on average women undertook 13 hours of housework and 23 hours of caring for the family compared with 8 and 10 hours respectively for men.²³ ONS data from 2016 suggests a similar split: women’s unpaid work totalled 25.54 hours per week as compared to 15.99 hours for men, with women undertaking 4.67 hours of childcare for men’s 1.89 hours per week.²⁴ When it comes to paid work, women are far more likely to work part-time. Around 42% of women work part-time as compared with 12% of men.²⁵ This division of work is reflected in attitudes to childcare and employment, which still suggest that childcare is primarily a mother’s role. Seventy-six percent of respondents to the British Social Attitude Survey in 2012 suggested that women should stay at home or work part-time where a child is under school age.²⁶ Where children are of school age, 52% of respondents still considered that a woman should work part-time and only 28% favoured full-time work.²⁷ Options involving both parents working full time, both parents working part-time, or the father staying at home or working part-time while the mother works full-time were unpopular (favoured by 4%, 5% and less than 1%

²¹ A Barlow, ‘Community of Property – the logical response to Miller and McFarlane?’ (2007) 39 *Bracton Law Journal* 19, 19.

²² M Brewer and A Nandi, ‘Partnership dissolution: how does it affect income, employment and well-being?’ (Institute for Social & Economic Research, 2014-30, 2014).

²³ J Scott and E Clery ‘Gender Roles’ in British Social Attitudes: The 30th Report (NatCen Social Research, 2012).

²⁴ ONS, ‘Women shoulder the responsibility of unpaid work’ (ONS Digital, 10 November 2016) <<http://visual.ons.gov.uk/the-value-of-your-unpaid-work/>> accessed 18 January 2017.

²⁵ ONS, ‘Women in the labour market: 2013’ (ONS, 25 September 2013). <<http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25>> accessed 18 January 2017.

²⁶ Scott and Clery, ‘Gender Roles’ in British Social Attitudes: The 30th Report (NatCen Social Research, 2012).

²⁷ Ibid.

respectively).²⁸ Where one parent has an established earning capacity and the other's career has been balanced with child-care responsibilities, an equal division does not mean an equal result.

The costs associated with childcare tend to arise because of the sorts of decisions that Barlow²⁹ describes: giving up a job or working part-time. If the cause of those sacrifices is instead caring for elderly relatives or a spouse who has become disabled, rather than children, that does not affect the motivation for or the costs of the decision. Either way, the reason is the interdependence inherent in marriage and the cost is to the caring party's ability to support herself or himself into the future.

The view of marriage reflected in case law such as *Miller; McFarlane*³⁰ recognises the reality of dependency and interdependency inherent in marriage and this is to be preferred to the pragmatic approach. Families make the joint decisions Barlow describes above for the functioning of the family as a whole, rather than for their own benefit. To take a purely causal approach to financial provision in this context seems overly commercial and simplistic. If one partner is made redundant during the marriage, then it is unlikely that the other would refuse to support them because the link is temporal only. A spouse might not choose to support their former partner in these circumstances at the point of divorce, but this does not mean that it is illegitimate for the law to impose such an obligation. For example, in such cases periodical payments could be made for a short time for the purpose of enabling a transition to independence. In seeking to locate the justification for such orders, as discussed further below, there is a balance to be struck between properly recognising dependence and treating an ex-spouse as insurer indefinitely.

Exploring causal and temporal connections

There are four possible combinations of causal and temporal connections:

1. **Causal and temporal**

For example, where both parties agree that one of them should give up work during the marriage to care for their children. This was the case, for example, in *Miller; McFarlane*.

2. **Causal but not temporal**

For example, where, following the end of the marriage, a child becomes very ill and one parent gives up work to care for them.

3. **Temporal but not causal**

²⁸ Ibid.

²⁹ A Barlow, 'Community of Property – the logical response to Miller and McFarlane?' (2007) 39 *Bracton Law Journal* 19.

³⁰ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

An example cited in the case law³¹ is where a party has given up work during the marriage to care for elderly parents. This issue is discussed further below.

4. Neither temporal nor causal

For example, where a spouse suffers a disability after the end of the marriage. This situation was described as an 'extrinsic, unrelated factor' by Baroness Hale in *Miller; McFarlane*.

These examples are illustrative of the differences between causal and temporal connections, but they, and recent case law, leave a number of questions unanswered. First, what is required for a causal connection? The first example above of giving up work to care for children seems to be a widely accepted causal link in the case law, but it is not entirely clear what exactly about these facts provides the causal link. Is it the legal connection of the parents to the children? Or is it the joint decision that creates the causal link? In *Miller; McFarlane*, Baroness Hale said this about the justification for one party being required to meet the needs of the other:

'The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past... A further source of need may be the way in which the parties chose to run their life together. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.'³²

This allows for the possibility that it is the joint decision which creates the causal link. However, it appears from the judgment in *Waudby v Aldhouse*,³³ discussed further below, that counsel for the wife sought to rely upon Baroness Hale's reference to elderly parents as an indication that a causal link was not always required. It is certainly possible to take this view. Whereas caring for the children of both parties clearly has a causal link to the relationship, caring for elderly parents, particularly one's own, is less clearly causally connected. On this interpretation, the justification for an award would be the temporal connection to the marriage and the idea of a causal connection is more narrowly drawn. It is, however, possible to see the causal link not in the person to whom the care is being provided but in the joint choices made during the course of the relationship. If this view is taken then it creates complexities for the case of caring for elderly parents. Whilst caring for one's

³¹ *Waudby v Aldhouse (Financial Remedies: Delay in Application)* [2016] EWFC B63.

³² *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24 [138].

³³ *Waudby v Aldhouse (Financial Remedies: Delay in Application)* [2016] EWFC B63.

spouse's elderly parents is perhaps less controversial as a basis for then claiming financial relief on divorce in relation to unmet future needs arising from having adopted that caring role (it is highly unlikely that this would happen in the absence of the relationship), it is perhaps harder to see the decision to care for your own parents in this light. It is certainly arguable that a joint decision could be taken into account, but it is also the case that the action might have been taken with or without the relationship and with or without the joint decision. It may, therefore, be conceptually clearer to see this an example of a need that is temporally connected to the relationship.

The question then arises whether it is better to adopt a broader approach to the idea of causal connection based on the idea of joint choices (and so to ground arguments for support in these cases on that ostensibly stronger basis), rather than to base claims merely on a temporal connection. As discussed further below, being able to construe a claim for financial relief as based on a causal rather than merely temporal connection tend to improve the position of the would-be payee. Not only are they less controversial than claims based only on a temporal connection, because they are consistent with both conceptions of marriage, but they seem to survive a delay in bringing a claim in a way that merely temporal connections do not. On the flip side, Lord Nicholls' examples of age and disability outlined at the outset are clearly not envisaged as being causally connected to the marriage.³⁴ The example of caring for your own parents is also problematic. Therefore, unless claims were simply allowed on utilitarian grounds, there would be no possibility of making a claim in such circumstances. This does not mean that all claims brought on the basis of a temporal connection will automatically succeed; the court is ultimately looking for a result that is fair between the parties in undertaking the discretionary exercise. This means balancing the competing interests of the parties and might involve, for example, looking at the extent to which the decision was reasonable within the context of the parties' relationship. To exclude the possibility of bringing temporal claims altogether is unduly limiting within the context of a relationship of interdependence.

The second question to consider in relation to causal and temporal connections is how these rationales fit with the ideas of needs, compensation and sharing. In line with the preceding discussion, it might be possible to argue that needs must be causally connected to the relationship. However, as the case law stands at present, needs may justify a claim if they are causally or temporally connected to the relationship. In contrast, compensation claims are causal: they are 'tied closely to the functioning of the marriage, the decisions the parties made, the contributions and

³⁴ *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24 [11].

associated sacrifices made'.³⁵ In *Miller, McFarlane* Lord Nicholls, for example, describes the principle's aim as being to redress 'any significant prospective economic disparity between the parties arising from the way they conducted their marriage'.³⁶ Baroness Hale takes a similar view, considering that compensation is 'for relationship-generated disadvantage'.³⁷

Sharing claims are different. They arise because of the nature of marriage as 'a partnership of equals'.³⁸ It is, therefore, arguable that sharing claims necessarily have a causal connection to the relationship. It is, however, conceptually easier to think of sharing claims separately, because they focus on the partnership rationale for dividing matrimonial property, rather than being concerned with the needs of, or losses suffered by, either party.

Causal and temporal links and the impact of delay

Several recent cases have considered the impact of a delay in bringing a financial claim. For example, in *Waudby v Aldhouse*³⁹ the delay between divorce and the application for financial remedy was 20 years. Similarly, in *Wyatt v Vince*⁴⁰ it was 18 years. More recently in *Briers v Briers*⁴¹ the Court of Appeal considered a much shorter, but still relatively significant, delay of 8 years. In all three cases, the delay featured in the courts' reasoning. Does the impact of delay differ when a claim is based on a causal connection as opposed to a merely temporal connection and, if so, how?

Needs cases

The recent cases of *Wyatt*⁴² and *Waudby*⁴³ both involved financial remedy applications brought some time after the end of the marriage. In both cases, at the time the parties separated there was no marital acquest to be divided. While both cases offer some support for the necessity of a causal connection in financial remedy proceedings where there has been a delay in bringing a financial claim, neither engaged with the issue directly.

³⁵ J Miles, '*Charman v Charman (No 4)* – making sense of need, compensation and equal sharing after *Miller/McFarlane*' [2008] CFLQ 378, 10.

³⁶ *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24 [13].

³⁷ *Ibid*, [140].

³⁸ *Ibid*, [143].

³⁹ *Waudby v Aldhouse (Financial Remedies: Delay in Application)* [2016] EWFC B63.

⁴⁰ *Wyatt v Vince* [2015] UKSC 14.

⁴¹ *Briers v Briers* [2017] EWCA Civ 15.

⁴² *Wyatt v Vince* [2015] UKSC 14.

⁴³ *Waudby v Aldhouse (Financial Remedies: Delay in Application)* [2016] EWFC B63.

Wyatt was the much publicised Supreme Court case in which the husband (the founder of Ecotricity) applied to strike out the wife's claim for financial remedy brought 22 years after their divorce. The Supreme Court refused to strike out the wife's case and listed it for trial. Whilst the court did not, therefore, determine the wife's application for financial remedy, some of the reasoning is of interest to the question of causal and temporal connections. Lord Wilson stressed that there was no time limit for making claims for financial remedy but that there 'is a prominent strain of public policy hostile to forensic delay'.⁴⁴ The court would look at the reasons for the delay and it might result in reduced provision being made to the applicant.⁴⁵ Lord Wilson also emphasised the importance of a causal connection in cases where there had been a delay in bringing a financial remedy claim:

'In order to sustain a case of need, at any rate if made after many years of separation, a wife must show not only that the need exists but that it has been generated by her relationship with her husband.'⁴⁶

*Waudby*⁴⁷ concerned the wife's application for financial remedy, brought 20 years after the date of separation. At first instance, she was awarded a lump sum of £10,000 and a joint-lives periodical payments order of £9,576 per annum on a needs basis. The appeal turned on the first instance judge's exercise of discretion. HHJ Rogers considered that the most troubling point was 'the causal link between the relationship and need'. The judge at first instance held the husband responsible for the wife's ongoing health difficulties. HHJ Rogers found that the judge at first instance had ignored key factors that contradicted her assessment. He had difficulty in finding a causal connection between the wife's need and the marital relationship. Interestingly, HHJ Rogers did not investigate the question of whether a causal connection was a necessary ingredient in the wife's needs claim: 'plainly the Deputy Judge regarded it as a necessary ingredient. For my part, I do not regard the theoretical availability of such a free standing award⁴⁸ as realistically the basis for upholding an Order made 20 or more years after separation'. The wife's award was, therefore, discharged on the factual basis that she had failed to establish a causal link to the relationship.

Both cases, therefore, suggest that if there is a long delay in bringing a claim then there must be a causal connection to make a claim based on needs. This is consistent with dicta of Mostyn J in *Rossi v Rossi*⁴⁹ in which the judge was concerned with an increase in the value of the parties' assets since

⁴⁴ *Wyatt v Vince* [2015] UKSC 14 [32].

⁴⁵ *Ibid*, [32].

⁴⁶ *Ibid*, [33].

⁴⁷ *Waudby v Aldhouse (Financial Remedies: Delay in Application)* [2016] EWFC B63.

⁴⁸ i.e. an award not based on a causal connection.

⁴⁹ *Rossi v Rossi* [2006] EWHC 1482 (Fam).

separation. His judgment is, however, expressed in wider terms; it indicates that Baroness Hale's speech in *Miller; McFarlane* 'suggest[s] that in order to justify a needs based award identification ought to be made of a causal connection between the need and the marital relationship'.⁵⁰

Lord Wilson's speech in *Wyatt* suggests that delay may act as a measure of remoteness in financial remedy applications: the delay may 'reduce or even eliminate its provision for the applicant'. This is necessary to balance the competing concerns of ensuring that a spouse receives their entitlement and making sure that life after divorce is a realistic possibility. As Thorpe LJ explained in a variation of maintenance case:

'it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards... The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might out of charity come to her rescue.'⁵¹

The need to balance these competing concerns was recognised by Lord Wilson himself in *Wyatt*⁵²:

'Consistently with the potentially life-long obligations which attend a marriage, there is no time-limit for seeking orders for financial provision or property adjustment for the benefit of a spouse following divorce... Nevertheless it remains important to address its effect upon the respondent. In some cases, albeit not in the present, a respondent can show that he has assumed financial obligations or otherwise arranged his financial affairs in the belief that the applicant would make no claim against him and that he has done so in a way which, even if it were possible, it would not be reasonable for him to put into reverse...'⁵³

It is suggested that, in cases of delay, the approach of adopting a more restrictive treatment of claims based on temporal connections is the best way of balancing these competing interests. This does not require abandoning the principled view, which suggests that such claims are legitimate at the point of divorce because of the interdependence inherent in marriage. Rather, it recognises that the effect of delay is often that the parties have gone on to build a new life, assuming that they are free to start again. At the point of divorce, the principled view aims for a result which is fair between the parties. It does not simply award the financially weaker spouse everything. It recognises that

⁵⁰Ibid, [91.8].

⁵¹*North v North* [2007] EWCA Civ 760, [32].

⁵²*Wyatt v Vince* [2015] UKSC 14.

⁵³Ibid, [32].

interdependence may require meeting a wider range of needs than just those that can be traced causally to the relationship. The objective of reaching a fair result is the same where there has been a delay. The difference is that the fact of the delay may have created competing factors that point away from meeting only temporal claims. This means that the shift will be a gradual one and there is no specific time limit that will automatically preclude a temporal claim.

By contrast, where delayed claims are based on a causal connection to the relationship, it is suggested, in line with the cases discussed above, that delay should not preclude a claim based on a causal connection. Unlike claims based on a temporal connection, which are concerned with fairness in the light of interdependence, causal claims, like sharing claims, are based on (a different form of) entitlement.

Sharing cases

*Briers*⁵⁴ involved a wife's claim for financial remedy brought 11 years after the end of the relationship (and 8 years after decree absolute had been pronounced). The wife had already received a payment of £150,000 from the husband. In addition, the former matrimonial home had been transferred into the wife's sole name in return for her transferring her one share in the business to the husband (he held the other 99 shares). However, no financial remedy order had been made and there had been no financial disclosure. The Court of Appeal approved the first instance judge's approach to delay which involved discounting the wife's share of the assets (she received 27-30% of the total). It considered that delay 'its explanation and effect, is an additional factor'.⁵⁵ The Court of Appeal commented:

'I do not for a moment disagree with the propositions culled from first instance authorities that delay may reduce the fairness of an entitlement or that the diligence of a party in prosecuting a claim may affect the proportion of any share that party receives. None of the first instance authorities can or does go so far as to suggest that the question of whether a non-matrimonial post-separation accrual can be shared is excluded by delay. Each case is of course dependent on its facts.'⁵⁶

⁵⁴ *Briers v Briers* [2017] EWCA Civ 15.

⁵⁵ *Ibid*, [22].

⁵⁶ *Ibid*, [25].

On the facts of *Briers*,⁵⁷ the post-separation increase in the value of the business was excluded from the sharing principle. Whilst this was treated as an 'undivided matrimonial asset'⁵⁸ because no financial remedy order had been made immediately on divorce, the wife had had no involvement in the business after separation.

Delay can certainly lead to difficulties in quantifying a party's entitlement under the sharing principle. In *Hart v Hart*,⁵⁹ for example, the court struggled with the calculation of the husband's pre-marital property after a 23-year relationship. The difficulties arose both from the problem of obtaining documentary evidence from so long ago, and from the husband's poor disclosure. The Court of Appeal in *Hart* was unable to adopt a mathematical approach to the quantification of non-marital property and instead relied upon 'a broad approach to determine the fairness of the proposed award'.⁶⁰ On this basis, it upheld the decision at first instance which based the wife's awards on her needs. The Court of Appeal considered that the judge must have taken into account 'the principle that an award should be the greater of the amounts reached by application of the sharing principle and that reached by the application of the needs principle'.⁶¹ On the facts, it is hard to see how the judge could have taken this principle into account given the dearth of evidence about the extent of the non-marital property. Nevertheless, in cases where delay alone creates this problem, this approach to an applicant's claim may be the fairest way to balance the interests of the two parties. On the facts of *Hart*, however, where many of the difficulties arose from the husband's litigation misconduct, it seems wrong for the wife to 'bear the burden of the factual uncertainty'.⁶²

Cases like these should not, however, be read as creating any kind of presumption that delay should reduce a party's share of the marital assets or that any post-separation accrual is necessarily non-matrimonial. The sharing principle as expressed in *Miller; McFarlane*⁶³ is seen to derive from the idea of marriage as a partnership. Baroness Hale talked about 'sharing of the fruits of the matrimonial partnership'⁶⁴ and Lord Nicholls of 'an equal share of the assets of the partnership'.⁶⁵ Thus, even a claim made years in the future is on the basis of entitlement. The equality of financial and non-financial contributions⁶⁶ means that both parties are viewed as having contributed equally to the

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, [23].

⁵⁹ *Hart v Hart* [2017] EWCA Civ 1306.

⁶⁰ *Ibid.*, [78].

⁶¹ *Ibid.*, [108].

⁶² Harris-Short, Miles and George, *Family Law: Text, cases, and materials* (OUP, 2015), chapter 7 update, October 2017 <http://fdslive.oup.com/www.oup.com/orc/resources/law/family/familytcm3e/resources/updates/harris_miles_update1017_ch07.pdf> accessed 12 December 2017.

⁶³ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

⁶⁴ *Ibid.*, [141].

⁶⁵ *Ibid.*, [16].

⁶⁶ *White v White* [2000] UKHL 54.

marital acquest, regardless of the nature of their contribution. There is no reason that the passage of time alone should lessen the value of a non-financial contribution.

Compensation?

There is support for the view that causal claims survive delay on the facts of *Wyatt*⁶⁷, albeit that the categorisation of the wife's claim under the headings of needs, compensation and sharing is more complex. It was suggested that the wife's best argument was based on her contributions to the marriage, which were not limited to those made prior to separation or even during the marriage: '[h]er case is no more than that, for whatever reason, the heavy burden [of raising the children of the family] fell upon her and, in effect, upon her alone.'⁶⁸ This seems to be a claim based on an entitlement, rather than need. However, this rationale creates complexities on the facts of that case. At the point of divorce, there was no marital acquest for the wife to make a claim against; the wealth had all been generated afterwards. Thus if the marital partnership ended at the point of divorce the wife's share would have been nothing: an equal share of nothing will always be nothing. The court envisaged a relatively limited award for the wife: rather than £0.55m for a home and £1.35m for an income fund, 'perhaps [the award] of an order which would enable her... to purchase a somewhat more comfortable, and mortgage-free, home for herself and her remaining dependants'.⁶⁹ Miles questions the advantage of framing the claim in terms of entitlement, rather than need, suggesting:

'What the contribution-based conceptualization of the claim perhaps does is enable us to avoid the forensic impossibility of disentangling the various causes of the wife's present needs, as the needs-based approach appears to require if only "relationship-generated" needs may be met.'⁷⁰

An alternative way of rationalising *Wyatt* would be on the basis of compensation: 'finally paying back the wife for her input and economic drag that her child-care responsibilities may have had on her'.⁷¹ These responsibilities, whilst post-dating the marriage, arise from the relationship: they are causally connected to it. Lord Wilson noted that the wife had suggested she might have a claim for compensation based on her care of the children inhibiting her ability to increase her earning

⁶⁷ *Wyatt v Vince* [2015] UKSC 14.

⁶⁸ *Ibid*, [34].

⁶⁹ *Ibid*, [36].

⁷⁰ Harris-Short, Miles and George, *Family Law: Text, cases, and materials* (OUP, 2015), chapter 7 update, October 2017 <http://fdslive.oup.com/www.oup.com/orc/resources/law/family/familytcm3e/resources/updates/harris_miles_update1017_ch07.pdf> accessed 16 November 2017.

⁷¹ *Ibid*.

capacity.⁷² He did not specifically address whether this claim would succeed. He did, however, indicate that a needs claim was unlikely to be successful on the facts and that the claim based on contributions 'may prove to be much more powerful'.⁷³

It is suggested that, contrary to Lord Wilson's reasoning, it may be simpler to see this as a needs case based on a causal link to the marriage:

'Causally, her claim was directly linked to the marriage and its consequences, including the post-divorce ramifications. She sought, and has now obtained, modest provision reflecting her post-divorce contributions as primary carer for the two children thereby vindicating needs created, and prolonged, by her post-divorce domestic contributions.'⁷⁴

Not only are needs claims 'forensically easier'⁷⁵ to run than those based on compensation but they avoid the complexity of using the entitlement-based language of contributions, associated with sharing claims, long after the end of the marital partnership which had itself generated no asset to be shared.

Temporal connections and the justification for spousal maintenance claims

The concern in cases with a temporal, and not a causal link, seems to be with needs. For example, needs arising from a disability or as a result of caring for elderly parents. The Supreme Court in *Miller; McFarlane* accepted that a needs claim could be met by either a capital or a maintenance award (or indeed some combination of the two). The idea of meeting needs through a spousal maintenance award in cases of delay provides further food for thought. In *Wyatt*, the Supreme Court indicated that there might be a sufficient causal connection to found a capital claim but not a maintenance claim. In *Waudby* the wife failed to establish a causal connection on the facts. It, therefore, remains an open question whether in cases of delay it is possible to apply for spousal maintenance based on a temporal connection to the marriage.

The basis for spousal maintenance, in so far as it is based on need, is itself contested. As I have argued, the pragmatist view, for example, considers that it should only be payable in respect of

⁷² *Wyatt v Vince* [2015] UKSC 14, [33].

⁷³ *Ibid*, [34].

⁷⁴ P Cayford QC, S Calhaem and M Geffin, 'Vindicating post-separation contributions: *Wyatt v Vince*' [2017] Fam Law 59.

⁷⁵ *Ibid*, 64.

claims that are causally connected to the relationship.⁷⁶ Ira Ellman⁷⁷ advanced an argument for alimony based on the interest in encouraging parties to share in marriage.⁷⁸ The idea behind this theory, which bases the claimant spouse's award on his or her lost earning capacity, is that the costs of traditional marriages differ for breadwinner and homemaker:

'It is a relationship in which the wife makes many initial investments of value only to her husband, investments a self-interested bargainer would only make in return for a long-term commitment.'⁷⁹

If society wants to encourage spouses to share in marriage, then alimony must provide redress for those who do so at their own expense.⁸⁰ As Hale explains:

'it comes back to what we think marriage is and is for. Is it simply a private arrangement from which each can walk away when they want and without regard to the consequences for the other? Or is it a status in which we all have an interest? Do we want to encourage responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners, their children and their elderly or disabled relatives, and can be properly compensated for this if things go wrong?'⁸¹

However, Ellman's theory ignores the extent to which, when decisions are made on an economic basis, the decisions that make economic sense during the relationship would not make economic sense outside of it. For example, Ellman suggests that:

'Whenever spouses have different earning capacities and want to plan rationally as a single economic unit, they will conclude that, where possible, they should shift economic sacrifices from the higher earning spouse to the lower earning spouse, because that shift will increase the income of the marital unit as a whole.'⁸²

On Ellman's theory, it is the claimant spouse's loss of earning capacity that is the key to the award they receive. However, the result of a decision such as the one outlined above is that the higher earner has benefitted from the relationship and the lower earner has lost a chance to improve their

⁷⁶ See, for example, *SS v NS* [2014] EWHC 4183 (Fam) [31].

⁷⁷ I Ellman, 'The Theory of Alimony' (1989) 77 *California Law Review* 1.

⁷⁸ *Ibid*, 81.

⁷⁹ *Ibid*, 42.

⁸⁰ *Ibid*, 51.

⁸¹ B Hale, 'Equality and autonomy in family law' (2011) JSWFL 3, 12.

⁸² I Ellman, 'The Theory of Alimony' (1989) 77 *California Law Review* 1, 46.

own position. Someone who leaves school at 17 might, in the absence of the relationship, have gone back to complete school and go on to higher education. Ellman recognises that calculations based on compensation are complex,⁸³ but this approach ignores the extent to which the fates of the parties in a marriage are intertwined. An approach that ignores the income of the wealthier spouse may be unjust: whereas he or she has potentially had extra chances as a result of the relationship, the claimant spouse has potentially lost them.

It is notable that compensation has not been favoured as a basis for spousal maintenance in practice, even by Ellman himself.⁸⁴ Both the American Law Institute Principles and Canadian Spousal Support Advisory Guidelines, for example, adjust 'disparity so as to reflect the extent of [merger over time], using time and childcare responsibilities as proxy measures of the extent to which the spouses have been interdependent.'⁸⁵ It is interdependence, and not economic rationality, that more fully explains the decisions couples make in such relationships. As Ellman recognises, people 'often sacrifice income to other values'.⁸⁶ Financial provision at the point of divorce should reflect this. The law should allow for spousal maintenance claims based on both causally and temporally connected claims at the point of divorce. However, consistently with the clean break principle, where claims are based on a temporal connection, they should be allowed on the basis of enabling a transition to independence. It must, however, be noted that this might ultimately mean a transition to reliance upon the state and/or a much reduced standard of living. In cases of delay, as in the case of capital claims, it will become increasingly difficult to mount a claim based on a temporal connection as other considerations come into play. In contrast, there is no reason that claims based on a causal connection (whether to meet needs or to compensate, and whether based on capital or income) should not survive into the future.

Conclusion

This article suggests a framework for the courts in considering financial remedy cases and, in particular, cases involving a delay in bringing financial remedy claims. It is suggested that the interdependence inherent in marriage justifies claims based on both a causal and a temporal connection to marriage. This does not, however, mean that a former spouse must act as insurer indefinitely. Over time, the balance of fairness to both parties means that temporal claims are less likely to succeed. Causally grounded claims, like sharing claims, more readily survive delay because they are based on a certain type of entitlement.

⁸³ Ibid, 78.

⁸⁴ Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), 3.18.

⁸⁵ Ibid, 3.124.

⁸⁶ I Ellman, 'The Theory of Alimony' (1989) 77 *California Law Review* 1, 60.

This framework may also be valuable when considering the forthcoming Supreme Court hearing in *Mills v Mills*,⁸⁷ a variation of maintenance case. The issue for the court is whether the Court of Appeal was right to take the wife's housing needs into account in increasing her periodical payments, in circumstances where she had received provision for these through the original capital settlement.⁸⁸ The source of the wife's present unmet needs seems key: is it her own actions since the original financial remedy order, or a causal or temporal link to the relationship itself that has generated them? If the former, it is suggested that the Court of Appeal decision is wrong in principle. It is not sufficient justification for the husband to be required to meet any shortfall that 'he could afford to pay periodical payments while maintaining his new family'.⁸⁹ There must also be a principled reason, namely a causal or temporal connection to the relationship, for him to be required to use these means to make payments for his former wife. If the wife's need arises from a temporal connection to the relationship, the question is what the passage of time since the original consent order in 2002 means for the balance of fairness to both parties when considering whether the award should be increased. If the needs can instead be causally connected to the relationship (on the facts, this would likely be based on her role as the primary carer of the parties' son) then delay itself should not prevent the wife's claims from succeeding.

On the facts, it appears that the source of the wife's additional needs, resulting in the increase in her periodical payments by the Court of Appeal, may be the result of her own actions since the financial remedy order, rather than the relationship itself. The judge at first instance found that the wife had made a series of unwise investments in moving upmarket with an increased mortgage on several occasions, although there had not been any financial mismanagement on her part. The more difficult question is whether her needs as found at the date of the 2002 order are still causally connected to the relationship or whether those needs continue to exist because of the wife's subsequent actions. If the latter, then it is hard to see why the husband should continue to be held responsible for meeting them.

Whilst consistency in reported case law and the underlying principles are important, it is also important to consider the way in which law operates in practice. Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid in family law cases has been very heavily reduced. This appears to have resulted in settlements increasingly being reached without legal advice.⁹⁰ It

⁸⁷ *Mills v Mills* [2017] EWCA Civ 129.

⁸⁸ Supreme Court, 'Permission to appeal decision: *Mills (Appellants) v Mills (Respondent)*' (*The Supreme Court*, 9 August 2017): www.supremecourt.uk/news/permission-to-appeal-decision-in-mills-v-mills.html, accessed 12 December 2017.

⁸⁹ *Mills v Mills* [2017] EWCA Civ 129, [16].

⁹⁰ See, for example, G Garton Grimwood, 'Briefing Paper – Litigants in person: the rise of the self-represented litigant in civil and family law cases' (House of Commons Library, 14 January 2016):

does, therefore, seem to be important to find out whether those settlements embody a similar view of marriage to that of the Supreme Court or whether the idea of marriage as a relationship between two autonomous individuals prevails. It seems to be the case that courts at first instance favour a clean break approach. For example, Hilary Woodward found that notwithstanding statistically significant differences between the median income of wives and husbands (the latter earning more), spousal periodical payments and pension sharing orders were made in a minority of cases.⁹¹ It was also the case that wives tended to receive a greater share of the capital provision,⁹² but this research,⁹³ and other studies,⁹⁴ suggest that women tend to lose out more than men in income terms on separation, which perhaps suggests the increasing influence of the autonomous individual approach to marriage. These data do not, of course, capture the large percentage of cases in which no order is made at all.⁹⁵ In cases where the parties do not have legal advice, legal norms around the equal value of domestic and financial contributions may carry even less weight. Thus the ever-reducing welfare state provision in England and Wales has the potential to leave the financially weaker spouse, and since that person is generally the children's primary carer, any children, in a very precarious position.

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113#fullreport>, accessed 23 March 2017.

⁹¹ H Woodward with M Sefton, 'Pensions on Divorce: An Empirical Study' (Cardiff Law School, 2014): <file:///ads.bris.ac.uk/filestore/MyFiles/StudentPG3/ah14571/Documents/Woodward%20-%20Pensions%20on%20Divorce.pdf>, accessed 11 December 2017.

⁹² *Ibid*, 25.

⁹³ *Ibid*, 23.

⁹⁴ H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income Couples' (2016) 30 *International Journal of Law, Policy and the Family* 338.

⁹⁵ G Davis, J Pearce, R Bird, H Woodward and C Wallace, 'Ancillary Relief Outcomes' [2000] CFLQ 43.